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No. 95-1975

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT W. HOWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the issuance of a warrant for petitioner's arrest on felony drug charges in this country authorized the Secretary of State to revoke his passport, subject to petitioner's opportunity for a post-revocation hearing.

2. Whether the government's third bill of particulars, which stated that petitioner had trafficked in amphetamine as part of the charged conspiracy to distribute methamphetamine, constructively amended the indictment.

3. Whether the district court considered petitioner's ability to pay the $2,000,000 fine that the court imposed.

4. Whether the disagreement among certain courts of appeals respecting the correct classification of various forms of methamphetamine under the Sentencing Guidelines violated petitioner's right to due process.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1) is unpublished, but the decision is noted at 81 F.3d 177 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1996. The petition for a writ of certiorari was filed on June 7, 1996, and was entered on the docket on June 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on one count of conspiring to possess marijuana with intent to distribute it, and one count of conspiring to possess methamphetamine with intent to distribute it, both in violation of 21 U.S.C. 846.[1] He was sentenced to 360 months' imprisonment and was fined $2,000,000. The court of appeals affirmed. Pet. App. 1.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner was actively engaged in the interstate distribution of marijuana. Petitioner initially obtained his marijuana from co-conspirator Tom Fisher, who lived in Oklahoma, and sold it to various persons in Georgia and Tennessee. After Fisher's home was searched pursuant to a warrant in May 1989, petitioner sought a new source. In early 1990, petitioner's partner and co-conspirator, James Gregory Hutcheson, arranged for a joint purchase of marijuana imported from Mexico by co-conspirator Gilberto Salinas. Between March and August 1990, Salinas's organization made three deliveries, totaling some 8,000 pounds of marijuana, to a junkyard near Hutcheson's home in southeast Georgia. Hutcheson kept some of the marijuana but distributed the rest at petitioner's direction. Gov't C.A. Br. 4-6.

Petitioner also trafficked in methamphetamine. Over a number of years, he distributed methamphetamine to various persons, including co-conspirators George Watson and J.T. Millwood, who then sold

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[1] Petitioner was acquitted of conspiring to possess cocaine with intent to distribute it (21 U.S.C. 846).

it to others. Laboratory analysis of methamphetamine seized from Watson showed that it had been cut with amphetamine. Co-conspirator Ricky Killingsworth had provided petitioner with some 125 pounds of amphetamine over almost a two-year period beginning in the spring of 1987. Gov't C.A. Br. 6-7.

2. In May 1992, Hutcheson was indicted. In December 1992, he advised petitioner that he was going to cooperate with the government, because he was facing a life sentence. Petitioner, who had planned to travel to the Philippines in January 1993, quickly changed his reservations and flew to the Philippines on December 22, 1992. He remained there until he was deported in January 1994. Gov't C.A. Br. 8.

In July 1993, petitioner was indicted. After a warrant issued for petitioner's arrest, the Secretary of State revoked his passport pursuant to 22 C.F.R. 51.72(a).[2] On January 20, 1994, the Department of State notified the government of the Republic of the Philippines that petitioner had been indicted on federal narcotics charges in this country, that a felony warrant had been issued for his arrest, and that his passport had been revoked. The State Department requested that the Philippines government detain

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[2] Section 51.72(a) provides that "[a] passport may be revoked or restricted or limited where * * * [t]he national would not be entitled to issuance of a new passport under § 51.70." Section 51.70(a)(1), in turn, provides that "[a] passport, except for direct return to the United States, shall not be issued in any case in which the Secretary of State determines or is informed by competent authority that * * * [t]he applicant is the subject of an outstanding Federal warrant of arrest for a felony."

petitioner and deport him for trial in the United States. Gov't C.A. Br. 9.

On Friday, January 28, 1994, petitioner was arrested by Philippines authorities as an undocumented and overstaying alien. The following day, the U.S. Embassy provided petitioner with notice of the revocation of his passport and of his right, under 22 C.F.R. 51.80, to seek a hearing on the revocation.[3] Petitioner did not request a hearing. On Monday, January 31, 1994, petitioner was deported from the Philippines and forcibly escorted back to the United States by two Philippines agents. Gov't C.A. Br. 9-10.

3. Before trial, petitioner moved to suppress certain statements that he had made on his return flight to the United States, as well as certain items that were seized from his person after he arrived in this country. A magistrate judge recommended that petitioner's motion be denied. The magistrate judge reasoned that, because petitioner was not returned to this country in violation of his constitutional rights, there was no basis for suppressing his statements or evidence obtained after his arrest. Magistrate Judge's Order, Report and Recommendation 12 (Dec. 27, 1994). The district court adopted the Magistrate Judge's Recommendation and denied petitioner's motion to suppress. Pet. App. 14.

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[3] Section 51.81 provides that "[a] person who has been the subject of an adverse action with respect to his or her right to receive or use a passport shall be entitled, upon request made within 60 days after receipt of notice of such adverse action, to require the Department [of State] or the appropriate Foreign Service post, as the case may be, to establish the basis for its action in a proceeding before a hearing officer." 22 C.F.R. 51.81.

4. Petitioner renewed his suppression claim on appeal. He also argued that the government impermissibly amended the indictment when, in a bill of particulars, the government averred that petitioner used amphetamine in his methamphetamine distribution scheme. Petitioner also challenged his fine and term of incarceration. The court of appeals affirmed by judgment order. Pet. App. 1.

ARGUMENT

1. Petitioner argues (Pet. 5-12) that the Secretary of State had no authority to revoke his passport while he was travelling overseas on the ground that a warrant had been issued for his arrest in this country, and he contends further that the revocation of his passport without a prior hearing violated his Fifth Amendment right to due process. The court of appeals correctly rejected both of those arguments, and those holdings do not merit further review.

a. "A passport is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981). It has long been considered "a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document." *Urtetiqui* v. *D'Arcy*, 34 U.S. (9 Pet.) 692, 698 (1835). Although the denial or revocation of a passport "undeniably curtails travel, * * * the freedom to travel abroad with a 'letter of introduction' in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations." *Haig* v. *Agee*, 453 U.S. at 306.

In *Kent* v. *Dulles*, 357 U.S. 116 (1958), the Court observed that passports have long been denied in circumstances that implicate significant sovereign interests, including where "the applicant [i]s participating in illegal conduct, [or] trying to escape the toils of the law." *Id.* at 127. In *Haig*, the Court concluded that, if the Secretary of State "may deny a passport for a certain reason, he may revoke a passport on the same ground." 453 U.S. at 291. The Secretary of State's regulations track those established principles: Section 51.70 provides that a person with an outstanding federal felony warrant of arrest "shall not be issued" a passport (22 U.S.C. 51.70(a)(1)); and Section 51.72 authorizes the Secretary of State to revoke a passport where the individual "would not be entitled to issuance of a new passport under § 51.70" (22 C.F.R. 51.72(a)).

In this case, petitioner "sought to escape the toils of the law" by taking refuge in the Philippines. Because he was the object of an outstanding arrest warrant stemming from his indictment on federal narcotics charges, he was not entitled to hold a passport, and his passport was correctly revoked.

b. Petitioner had no right to a hearing before the revocation of his passport. Where substantial sovereign interests are at stake, the government may take action—including summary revocation of a passport—"to ensure that the holder may not exploit the sponsorship of his travels by the United States." *Haig*, 453 U.S. at 309. Although this case does not involve an immediate threat to national security of the sort posed in *Haig*, the ability summarily to revoke a passport may be critical in circumstances like these to prevent a fugitive's escape from justice—a substantial, indeed compelling, governmen-

tal interest. *Kent*, 357 U.S. at 127. The issuance of a felony arrest warrant based on an indictment returned by a grand jury represents a charge of serious misconduct that often may justify prompt action, subject to a later hearing. *FDIC* v. *Mallen*, 486 U.S. 230, 240-241 (1988) (upholding constitutionality of banking agency's suspension of a bank officer upon his felony indictment, subject to a post-suspension hearing). Moreover, where, as here, the criminal charges themselves require the defendant to return to this country to face trial, revocation of a passport presents virtually no risk of an erroneous deprivation. In those circumstances, the opportunity for a prompt post-revocation hearing (see 22 C.F.R. 51.81) is more than adequate to protect the private interests at stake.

c. We are aware of only one other court of appeals decision that has involved a challenge to the revocation of a passport without a prior hearing—*Magnuson* v. *Baker*, 911 F.2d 330 (9th Cir. 1990). In *Magnuson*, the court of appeals took a narrower view of the power of the Secretary of State, but that case involved significantly different facts. The holder of the revoked passport, Charles Vernon Myers, claimed to be a United States citizen. In response to Myers' application, the Department of State initially determined that he was a citizen and granted him a passport. Several months later, the Immigration and Naturalization Service, which was attempting to deport Myers, objected to the issuance of his passport. The Department of State then informed Myers that the passport had been issued in error, and demanded that Myers return it. Myers requested a hearing on his claim to citizenship, but the State Department denied it. *Id.* at 331-332.

Myers filed suit in district court, claiming that the revocation of his passport violated 22 U.S.C. 2705, which provides in part that a passport "shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction." 911 F.2d at 336. The district court granted summary judgment in Myers' favor, and the court of appeals affirmed. The court of appeals concluded that Section 2705 limits the Secretary of State's power to revoke a passport to those reasons that would justify revocation of a certificate of naturalization or of citizenship, and that the holder must first be afforded an opportunity for a hearing. 911 F.2d at 334.

Although the court of appeals in *Magnuson* based its holding on statutory construction, its reasoning was influenced by the fact that the passport holder claimed to be a citizen who had a right to remain in this country. 911 F.2d at 335 n.10. Defenses to deportation based upon claims of citizenship have long been accorded special protection by the courts. See, *e.g.*, *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) ("Jurisdiction in the executive to order deportation exists only if the person arrested is an alien."). Here, unlike in *Magnuson*, petitioner's citizenship *vel non* was not at issue, and he did not face deportation from this country. Petitioner, moreover, was indisputably the object of an outstanding arrest warrant, which under settled principles justified his return to this country. *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932) ("[T]he United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires, and to penalize in the

case of refusal."). Whatever limitations may attend the revocation of a passport in a case like *Magnuson* do not control the validity of the Secretary of State's actions in this case.

d. Finally, even if the Secretary of State's revocation of petitioner's passport were invalid, petitioner would have no right to suppress any evidence that resulted from his deportation by the Philippines government. The violation of statutes or regulations governing the revocation of a passport would not entitle petitioner to suppress evidence, where, as here, those provisions do not expressly require that remedy. See *United States* v. *Cacerers*, 440 U.S. 741 (1979). Nor, if the revocation of the passport without a prior hearing violated due process, would that violation warrant exclusion of the evidence obtained during and upon his return to this country. Absent proof of an actual injury, a violation of procedural due process provides no entitlement to substantive relief. See *Carey* v. *Piphus*, 435 U.S. 247, 266 (1976); see also *id.*, at 259 ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."). Here, petitioner has not contended (and could not plausibly contend) that provision of a prior hearing would have affected the Secretary of State's determination to revoke his passport, or that the opportunity for a prior hearing would have otherwise prevented his return to this country. Indeed, although petitioner was advised of his right to a post-revocation hearing before his deportation from the Phillippines, he did not seek such a hearing. Without a showing that the absence of a prior hearing affected the revocation of his passport or his deportation from the Philippines, the claimed right to a prior hearing

can provide no basis for suppression of the evidence obtained in the course of petitioner's return to this country.

2. Petitioner argues (Pet. 12-15) that the government's third bill of particulars, which listed the amounts of various drugs that petitioner distributed and alleged, *inter alia*, that he had distributed at least 125 pounds of amphetamine, impermissibly amended the indictment. That is incorrect. The government's bill of particulars averred, and its proof at trial showed, that petitioner sold methamphetamine that had been mixed with substantial quantities of amphetamine. The co-conspirators' use of amphetamine as a cutting agent for methamphetamine was clearly admissible as evidence of petitioner's involvement in the methamphetamine conspiracy. Gov't C.A. Br. 31; Pet. App. 24-30. Petitioner could not have been surprised by that evidence, moreover, because he was given notice of the government's allegations in pretrial discovery. Gov't C.A. Br. 30.

Contrary to petitioner's argument (Pet. 14), the government's presentation of evidence of the use of amphetamine in the methamphetamine conspiracy did not create a risk of conviction for an uncharged offense. The third bill of particulars was not read to the jury (Pet. App. 15), and the jury was not otherwise permitted to convict petitioner on a charge of conspiring to possess *amphetamine* with intent to distribute it; rather, the charge presented to the jury was conspiracy to possess *methamphetamine* with intent to distribute it, and ample evidence was introduced to support petitioner's conviction of that offense.[4]

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[4] Petitioner's reliance on *United States* v. *Willoughby*, 27 F.3d 263 (7th Cir. 1994), is misplaced. In that case, the defen-

3. Petitioner argues (Pet. 15-21) that the $2,000,000 fine imposed by the district court was excessive because the court failed to consider petitioner's ability to pay the fine. Contrary to petitioner's argument, the court expressly found that petitioner had substantial, illegally-obtained assets, Gov't C.A. Br. 42-43, and the amount of the fine imposed by the court was supported by the evidence of petitioner's resources presented by the government at sentencing. The government showed that the farm on which petitioner lived was worth $250,000; that he owned a second farm and a store; that he disposed of other assets while in the Philippines; and that funds in the bank accounts of petitioner's defunct used car business exceeded the proceeds of car sales by $1.2 million. *Id.* at 43. Petitioner provided the Probation Officer with no information about his assets, and he introduced no evidence to rebut the government's proof at sentencing. *Id.* at 44-45. He therefore has no basis on which to complain about the fine.

Petitioner also errs in contending (Pet. 21) that the fine impermissibly punishes his spouse, by depriving her of marital assets on which she depends. The

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dant was charged in a bench trial with using or carrying a firearm during and in relation to the distribution of cocaine. 18 U.S.C. 924(c). The judge considered evidence linking the weapon to the defendant's possession of cocaine with intent to distribute it. Because the court of appeals found that the government had introduced no evidence linking the gun to the actual distribution of cocaine, it concluded that the admission of evidence linking possession of the gun generally to the defendant's drug trafficking activities had impermissibly broadened the indictment. 27 F.3d at 266-267. In this case, in contrast, there was abundant proof that petitioner engaged in a methamphetamine conspiracy and that he utilized amphetamine as part of that conspiracy.

district court found (Pet. App. 19-20) that petitioner was involved for "most of his adult life * * * in criminal activity and the type of criminal activity that is designed in making money; that is, illegal liquor, stealing cars or dealing in stolen cars or dealing with drugs, all of which relates to greed and providing and enhancing one's family status, financial status in life." Petitioner's spouse has no equity in retaining his ill-gotten gains.

4. Petitioner argues (Pet. 22-26) that the Sentencing Guidelines' treatment of various forms of methamphetamine is so confusing that it provides inadequate notice of potential sentences for methamphetamine-trafficking offenses. That argument is without merit.

Petitioner was on notice of the manner in which the Sentencing Guidelines would be applied in this case. The issue at petitioner's sentencing was whether 53 pounds of methamphetamine that the district court attributed to petitioner was "D" or "L" methamphetamine. Petitioner conceded that 8.8 grams of that methamphetamine was "D" methamphetamine; he contested the characterization of the remaining methamphetamine. Gov't C.A. Br. 47. Under Eleventh Circuit law applicable to petitioner's offense, the term "methamphetamine" in the Sentencing Guidelines encompasses all forms of that substance, except to the extent that the Guidelines specifically single out "L" methamphetamine. *United States* v. *Carroll*, 6 F.3d 735 (1993), cert. denied, 510 U.S. 1183 (1994). Consistent with that settled principle, the district court determined that all of the methamphetamine at issue in this case should be treated as "D" methamphetamine. See Pet. App. 16.

Contrary to petitioner's argument, any disagreement among various courts of appeals on the treatment of methamphetamine under the Sentencing Guidelines (Pet. 23-25) did not deprive him of due process. Moreover, where there is a need for clarification of the Guidelines, that task is appropriately reserved for the Sentencing Commission. *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). The Sentencing Commission has recently amended the Guidelines by removing the lower penalties for L-methamphetamine from the Drug Equivalency Tables. See United States Sentencing Comm'n, *Federal Guidelines Manual*, App. C, amend. 518, at 817 (Nov. 1, 1995). As a result, L and D-methamphetamine are now treated the same, eliminating any question regarding the proper treatment of DL-methamphetamine. See *United States* v. *Watkins*, 912 F. Supp. 417, 419 n.4 (E.D. Ark. 1996). Any confusion regarding the proper treatment of DL-methamphetamine under prior versions of the Guidelines is of limited future consequence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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